Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

L. P. PATTERSON, et al., *Petitioners,*

v.

NATIONSBANK OF TEXAS, N.A., et al., *Respondents.*

consolidated with

L. P. PATTERSON, et al., *Petitioners,*

v.

BANK ONE, TEXAS, N.A., et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December, 1995

35 pp

QUESTIONS PRESENTED

Is the Comptroller of the Currency's construction of the term "visitorial" in the Federal Reserve Act, 12 U.S.C. § 484(a), preemptively depriving state legislatures of the power to subpoena information from national banks in the course of drafting or studying proposed legislation, binding upon federal courts?

Does the "plain statement rule" in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), preclude the Comptroller from engaging in interpretive rulemaking that preemptively deprives state legislatures of their subpoena power, or alter the standard of review for such rulemaking?

LIST OF PARTIES

L.P. PATTERSON State Representative	Petitioner
CHARLES FINNELL State Representative	Petitioner
RENATO CUELLAR State Representative	Petitioner
JUDY HAWLEY State Representative	Petitioner
TRACY O. KING State Representative	Petitioner
BARBARA RUSLING State Representative	Petitioner
BOB RABUCK State Representative	Petitioner
GARY WALKER State Representative	Petitioner
DAVID SWINFORD State Representative	Petitioner
NATIONSBANK OF TEXAS, N.A.	Respondent
TIMOTHY P. HARTMAN Chairman of NationsBank	Respondent
ROBERT B. LANE President of NationsBank	Respondent

BANK ONE, TEXAS, N.A.	Respondent
HARVEY MITCHELL Chairman of Bank One, Texas, N.A.	Respondent
RONALD STEINHART President of Bank One, Texas, N.A.	Respondent

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THIS COURT:

Members of the Standing Committee on Agriculture and Livestock of the Texas House of Representatives, L.P. Patterson, Chairman, Renato Cuellar, Vice-Chairman, Charles Finnell, David Swinford, Bob Rabuck, Judy Hawley, Tracy O. King, Barbara

Rusling and Gary Walker (the "State Representatives" or "Legislative Committee")[1], by and through their Attorney Dan Morales, Attorney General of Texas, now respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in favor of two national banks, Bank One, Texas, N.A., and NationsBank of Texas, N.A. ("the Banks"), and individually named officers and/or directors of those Banks.

OPINIONS BELOW

The unpublished opinion of the Fifth Circuit is reproduced in the Appendix (page numbers designated "A") (separately bound and filed herewith) at A-1. The unpublished opinion of the district court is also reproduced in the Appendix (A-3), as are the OCC opinion letters. (A-8 and A-14).

JURISDICTION

The Fifth Circuit entered judgment on September 11, 1995. No petition for rehearing was filed. The State Representatives invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

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1 New members of the Legislative Committee, Judy Hawley, Tracy O. King, Barbara Rusling and Gary Walker, were substituted for Elton Bomer, Allen Hightower, Mary Denny James, Jerry Johnson, Bob Turner and Bernard Erickson, who were no longer on the Committee when the district court's judgments were appealed to the Fifth Circuit. FED. R. APP. P. 43(c)(1). Also, the name of the Committee has been changed from the Standing Committee on Agriculture and Wildlife Management to the Committee on Agriculture and Livestock.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 301.024 of the Texas Government Code, TEX. GOV'T CODE ANN. § 301.024 (West 1988), sets out the subpoena power of the Legislative Committee. The Banks, in arguing that federal law preempted the legislative subpoenas, relied on the following statutes, interpretive rules and agency opinion letters: 12 U.S.C.A. §§ 484, 485 (West 1989); 12 C.F.R. § 7.6025(b) (1993); 1993 WL 639366 (OCC Interpretive Letter 616, February 26, 1993); 1993 WL 740918 (OCC Opinion Letter, June 3, 1993). These materials are reproduced in the Appendix accompanying this Petition. SUP. CT. R. 14.1.(f).

STATEMENT OF THE CASE

A. Factual background.

The State Representatives are members of the Standing House Committee on Agriculture and Livestock. (R.NB. Vol. 1, 0002.)[2] The Legislative Committee became concerned about the availability of credit in rural communities in Texas. The State Representatives believed that bank lending practices--particularly as they affect rural communities--were an appropriate subject for legislative study. (R.NB. Vol. 1, 0127, 0207).

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2 The record in *NationsBank of Texas v. Patterson*, civil action no. 3:93-CV-1107-G, is referred to as ("R.NB. _____"). The record in *Bank One Texas v. Patterson*, civil action no. 3:93-CV-1081-G, is referred to as ("R.BO._____").

With the cooperation of such entities as the Farmers Home Administration of the United States Department of Agriculture, the Independent Bankers' Association, and various consumer groups, the State Representatives amassed a great deal of information on agricultural finance. The Committee also examined the public reports of independent banks, to determine the level and type of lending in the communities they served. (R.NB. Vol. 1, 0208, 0212-14).

However, a major gap in the Legislative Committee's information was the scope lending by national banks that had statewide branch operations. The Committee could not determine the lending patterns of these banks within various regions of the state, because they publicly reported their activities only on a statewide or consolidated basis. (R.NB. Vol. 1, 0208-14.) The Legislative Committee concluded that without such information, it could not make informed legislative recommendations for a carefully considered, well-reasoned assistance program. (R.NB. Vol. 1, 0208-14).

When it became clear the Banks would not voluntarily produce the information sought, the Legislative Committee issued subpoenas, pursuant to section 301.024 of the Texas Government Code. TEX. GOV'T CODE ANN. § 301.024 (West 1988) (R.NB. Vol. 1, 0014-27, 0127-28, 0208-13).

B. The Law Suit.

Pursuant to 28 U.S.C. § 1331, the Banks brought separate lawsuits for injunctive and declaratory relief, arguing that the Federal Reserve Act (the "Act"), 12 U.S.C. § 484(a), and an informal interpretive rule adopted by the Comptroller, 12 C.F.R. § 7.6025(b) (1993), preempted the legislature's power to issue the subpoenas. On cross-motions for summary judgment, the district court held for the Banks.

In support of its judgments declaring the subpoenas void and enjoining their enforcement, the court concluded that because Congress had not "directly spoken to the precise question at issue," *i.e.*, whether the legislative subpoenas were an exercise of "visitorial" power within the meaning of 12 U.S.C. § 484, the question before the court was whether the Comptroller's interpretive rule was "based on a permissible construction of the statute." *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

The court concluded that the Comptoller's construction was reasonable. However, the court did not address whether the subpoenas were an exercise of state sovereignty going to "the heart of representative government," so as to require application of the "plain statement rule" in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). On consolidated appeal, the Fifth Circuit summarily affirmed the judgments, concluding the district court had committed no error of law or abuse of discretion.

REASONS FOR GRANTING THE PETITION

I. SUMMARY OF REASONS

Serving a legislative subpoena on a national bank is not an exercise of visitation. More importantly, the Comptroller's erroneous interpretation threatens the proper balance of federal and state power in the field of national banking. Regulation of national banking has been one of dual control since the passage of the first National Bank Act in 1863. The rights of national banks to contract, collect debts, and acquire and transfer property are all based on state law. As recently as last year, Congress reaffirmed in the Riegle-Neal Interstate Banking and Branching Efficiency Act that state laws regarding community reinvestment, consumer protection and fair lending apply to any branch in the host state of an out-of-state national bank to the same extent as such laws apply to a branch of a bank chartered by that state.

Therefore, the issue of whether the Comptroller's interpretive rule and opinion letters contain a permissible construction of the Act presents an important federal question which has not been, but should be, decided. The fundamental importance of this issue rests on the straightforward proposition that state legislatures cannot intelligently address questions of policy without an understanding of the facts. Denying legislatures the power to investigate is tantamount to depriving them of the ability to legislate effectively.

The permissibility of the Comptroller's construction also raises the important federal question of how much discretion an administrator has in adopting preemptive interpretive rules. In this case, the Comptroller adopted a definition of "visitorial" that has no basis in the federal statute, the case law, common law or common usage. At issue, then, is whether "permissible construction" allows an agency to manufacture a preemptive definition out of whole cloth.

The Legislative Committee's issuance of subpoenas in the course of carrying out its legislative duties is clearly an exercise of state sovereignty of the most fundamental sort. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court addressed the question of whether the federal Age Discrimination in Employment Act preempted a requirement in the Missouri constitution that judges retire at the age of seventy. It held that the power to establish the qualifications of those who would govern was among the state decisions that "go to the heart of representative government." *Id.* at 461 (quoting *Sugarman v. Dougall*, 413 U.S. 634 (1973)). Because of this, Congress had to make its intention to preempt "unmistakably clear in the language of the statute." *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

Because this Court did not clearly define the circumstances in which this "plain statement rule" applies, it should now address the important federal question of whether the Legislative

Committee's issuance of subpoenas is among those state decisions that "go the heart of representative government." The subsidiary question of how and when the plain statement rule applies to preemptive agency rulemaking is an equally important federal question which has not been, but should be, squarely addressed by this Court.

II. ARGUMENTS AND AUTHORITIES AMPLIFYING THE REASONS FOR ALLOWING THE WRIT

A. Introduction: The Comptroller's construction of "visitorial" is clearly unreasonable.

This Court has reiterated that:

> "It is settled that courts should give great weight to any *reasonable* construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.'" *Clarke v. Securities Industry Assn*, 479 U.S. 388, 403-04, 107 S.Ct. 750, 759 (1987) (quoting *Investment Company Institute v. Camp*, 401 U.S. 617, 626-27, 91 S.Ct 1091, 1097 (1971)) (emphasis added).

Under the now familiar formulation, when the courts review an administrator's statutory construction, they first inquire as to whether "the intent of Congress is clear" as to "the precise question at issue." *Chevron, U.S.A. Inc. v. Natural Resources*

Defense Council, Inc., 467 U.S. 837, 842 (1984). If it is, "that is the end of the matter." *Id.* But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In other words, "if the administrator's reading fills a gap or defines a term in a way that is reasonable in the light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'" *NationsBank v. Variable Annuity Life Ins. Co.*, 115 S.Ct. 810, 813-14 (1995).

The Act, 12 U.S.C § 484, provides that national banks are not subject to state "visitorial powers," but does not define that term. The Comptroller has issued an informal interpretive rule asserting that under the Act state officials have no authority to examine or require the production of books or records from national banks, except for the limited purpose of ensuring compliance with applicable state unclaimed property and escheat laws. 12 C.F.R. § 7.6025(b) (1993). [3] And in an opinion letter, he has concluded that the legislative subpoenas are "visitorial" in nature. 1993 WL 740918 (OCC Opinion Letter, June 3, 1993).

This sweeping construction, which prohibits nearly all state officials--including Texas legislators--from compelling information

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[3] The agency adopted this interpretation in 1983. *See* 48 Fed. Reg. 3936 (1983). Essentially treating it as an informal interpretive rule, the agency gave interested parties neither notice of the proposed rule, nor opportunity to comment, as required for substantive rules under the Administrative Procedure Act. *See* 5 U.S.C.A. §§ 500, 553 (West 1977).

from a national bank, is clearly unreasonable for several reasons. First, it disregards the states' strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, states have a legitimate interest in enacting laws to protect the rights and interests of their consumers, businesses, and communities.

Second, the Comptroller's novel interpretation of "visitorial" simply has no antecedent in the federal statute, the case law, the common law, or in common usage. The Comptroller has arbitrarily departed from definitions and concepts consistently and repeatedly expounded on in the English common law and throughout the history of American jurisprudence. "Permissible construction" should not be so elastic as to allow an agency to invent a new definition for a well-established term.

Finally, the Comptroller has given congressional *ambiguity* a construction which divests state legislatures of their power to issue subpoenas. But only clear and unmistakable language in the statute itself can support such preemption.

B. It is undisputed that the regulation of banking is one of dual control; the Comptroller's construction therefore threatens the proper balance of state and federal power in the field of national banking.

Although there is little doubt that Congress could exercise its commerce power to exclude state control over national banks, it

has not done so. Indeed, regulation of national banking has been one of dual control since passage of the first National Bank Act in 1863. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665 (repealed 1864) (current version at 12 U.S.C.A. §§ 21-215b (West 1989 & Supp. 1995). In only a few instances has Congress explicitly preempted state regulation of national banks. More commonly, it has been left to the courts to delineate the proper boundaries of federal and state supervision. *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3rd Cir. 1980).

As this Court recognized in *McClellan v. Chipman*, 164 U.S. 347 (1896), "National Banks . . . 'are governed in the daily course of business far more by the laws of the state than of the nation.'" *Id. at 356* (*quoting National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869)). Their right to contract, collect debts, and acquire and transfer property are all based on state law. *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3rd Cir. 1980). In *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944), Chief Justice Stone wrote, "[t]his Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions."[4]

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[4] In fact, in *Anderson National Bank v. Luckett*, 321 U.S. at 242, the Supreme Court specifically rejected an argument by the OCC, as *amicus curiae*, as to the broad preemptive effect of the National Bank Act.

As recently as last year, Congress reaffirmed in the Riegle-Neal Interstate Banking and Branching Efficiency Act ("Riegle-Neal"), the states' continuing regulatory authority over national banks in the areas community reinvestment, consumer protection, fair lending and the establishment of intrastate branches. *See* Pub. L. No. 103-328, § 102(b) 108 Stat. 2338 (1994) (amending 12 U.S.C. § 36).

Congress emphasized in the legislative history to Riegle-Neal that states have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, states have a legitimate interest in protecting the rights of their consumers, businesses, and communities. *See* Conf. Rep. to Accompany H. R. 3841, H. Rep. 651, 103rd Cong., 2d Sess. 53 (1994). [5]

The Comptroller's interpretive rule and opinion letter threaten this balance of state and federal power in the field of

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[5] Congress also created new procedural safeguards in Section 114 of Riegle-Neal to apply when such agencies attempt, by way of informal interpretive rule or opinion letter, to preempt state laws regarding community reinvestment, consumer protection or fair lending. *See* Pub. L. No. 103-328, 108 Stat. 2338 (1994). Section 114 of the Act, which amends 12 U.S.C. § 21, *et seq.*, now requires that the agency publish in the Federal Register notice of the interpretive rule the agency is considering, and consider any comments received in formulating the final rule or opinion letter. The amendment reflected congressional concern over "inappropriately aggressive" preemption by federal banking agencies. *See* Conf. Rep. to Accompany H.R. 3841, H. Rep. 651, 103rd Cong., 2d Sess. 53-54 (1994).

national banking, because they impede the efforts of state legislators to inform themselves about the very areas in which they are empowered to legislate. The authority to gather information--to compel its production if need be--is an essential tool of legislative bodies.

C. The Comptroller's interpretive rule wrenches the term "visitorial" from its plain historic meaning; "permissible construction" does not allow an agency to invent a new definition for a well-established term.

Moreover, the Comptroller has arbitrarily departed from the well-established definitions of visitorial power. Under these definitions, visitorial authority has meant the power *to enforce* laws regulating the existence of the corporation, including the power to compel forfeiture of a corporation's charter. Section 484 derives almost unchanged from § 54 of the National Bank Act of 1864. Act of June 3, 1864, ch. 106, 13 Stat. 99 (current version at 12 U.S.C.A. §§ 21-215b (West 1989 & Supp. 1994)). When Congress first passed the 1864 National Bank Act, the definition of "visitorial" was firmly embedded in the common law. *See Dartmouth College v. Woodward*, 7 U.S. (4 Wheat. 673) 518 (1819) (Story, J.); *Allen v. McKean*, 1 F. Cas. 489, 497 (C.C.D. Me. 1833).[6]

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[6] The term "visitorial" appeared in England at least as early as the sixteenth Century. It was used to refer to "a visit of inspection made by one or more persons having civil authority or jurisdiction or specially appointed to exercise supervision within a certain sphere." OXFORD ENGLISH DICTIONARY, vol. II, 3643 (Compact ed. 1971). Blackstone also discussed the term in some detail. 1 WILLIAM BLACKSTONE, COMMENTARIES 467-468 (1979 reprint of 1765

Since then, state and federal courts interpreting the language in § 484 of the Act have applied the narrow common law definition of "visitorial." *See Guthrie v. Harkness*, 199 U.S. 148, 156-58 (1905) (inspection of bank records by shareholder held not to be visitorial); *First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737, 740-741 (C.C.N.D. Ohio, 1881) (county tax audit held not to be visitorial); *Bowles v. Shawano Nat'l Bank*, 151 F.2d 749, 751 (7th Cir. 1945) (subpoena by Office of Price Administration for bank records held not to constitute exercise of visitorial power), *cert. denied*, 327 U.S. 781 (1946); *NLRB v. Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir.) (NLRB subpoena requesting bank records held not to constitute exercise of visitorial power), *cert. denied*, 326 U.S. 731 (1945); *Bank of America Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 105-106 (D.C. Cir. 1939) (SEC subpoenas for information regarding, *inter alia*, bank lending practices held not to constitute exercise of visitorial power); *Peoples Bank v. Williams*, 449 F.Supp. 254, 258-259 (W.D. Va. 1978) (SEC subpoena for bank records held not to constitute exercise of visitorial power); *FTC v. Rockefeller*, 441 F.Supp. 234, 243 (S.D.N.Y. 1977) (FTC subpoenas for bank records held not to constitute exercise of visitorial power); *Best v. United States Nat'l Bank*, 739 P.2d 554,

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ed.) ("I proceed therefore next to enquire, how these corporations may be *visited*. For corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, enquire into, and correct all irregularities that arise in such corporations.") (emphasis in original).

563 (Or. 1987) (class action by depositors to inspect bank records to determine whether NSF charges 'cost justified' and consistent with state contract law held not to constitute exercise of visitorial power); *State v. First Nat'l Bank*, 313 N.W.2d 390, 392-395 (Minn. 1981) (examination of records of national banks by state treasurer to enforce state unclaimed property laws held not to constitute exercise of visitorial power); *Clovis Nat'l Bank v. Callaway*, 364 P.2d 748, 756 (N.M. 1961) (enforcement of New Mexico unclaimed property law against national banks held not to constitute exercise of state visitorial power); and *State v. First Nat'l Bank of Portland*, 123 P. 712, 714-716 (Or. 1912) (audit by Oregon Attorney General to enforce escheat laws to unclaimed bank deposits held not to be visitorial).

Plainly, none of the powers wielded by the Legislative Committee are visitorial in nature. Neither the Committee, nor for that matter, the Texas Legislature as a whole, has the power to prosecute violations of law, the power to audit the books and records of a corporation, the power to bring an action for forfeiture of a corporate charter, or the power to place the assets of a corporation in receivership. The Committee can only conduct studies and propose legislation to the full House. The Committee's subpoena power to compel testimony and the production of documents relates only to its need to properly inform itself in the drafting and proposing of legislation. A legislative subpoena is not an exercise of visitorial power.

Just as compelling, Congress has never sought to amend the language in § 484 to repudiate the courts' long-standing interpretation. As recently as 1982, Congress amended section 484 adding subsection (b) to expressly permit examinations by state auditors with respect to unclaimed property. *See* S. REP. No. 536, 97th Cong., 2nd Sess. 29 (1982) *reprinted* in 1982 U.S.C.C.A.N. 3054, 3083. Had Congress wished to overturn one hundred years of case law interpreting the statute, it surely could have done so. Instead, Congress continued to rely on a term of art--"visitorial"--which has a specific meaning as set out in a long line of cases. The new subsection (b) did nothing to change the meaning of "visitorial"; rather, it simply accompanied extensive new provisions clarifying the law of unclaimed deposits for bank insurance purposes. *See* S. Rep. No. 536, 97th Cong., 2nd Sess. 29 (1982) *reprinted* in 1982 U.S.C.C.A.N. 3054, 3083.

The Comptroller's cavalier interpretation of section 484 also alters the common law meaning of the term "visitorial," even though statutes are not to be construed in derogation of the common law, absent clear legislative intent. *See United States v. Texas*, 113 S.Ct 1631, 1634 (1993) (statutes that invade common law must be read with presumption favoring retention of long-established principles absent evident statutory purpose to the contrary); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an

unequivocal statement of its purpose would have been made."); *see also In re Mark Anthony Constr.*, 886 F.2d 1101, 1107 (9th Cir. 1989); *Deaton v. Dreis and Krump Mfg. Co.*, 134 F.R.D. 219, 225-226 (N.D. Ohio 1991) ("[s]tatutes in derogation of the common law, such as this one, are to be strictly construed").

While administrative agencies charged with enforcement of a regulatory statute enjoy considerable discretion in construing or interpreting its terms, such discretion should not include the option of creating a wholly new meaning for a well-established term. The Comptroller's novel interpretation of "visitorial" presents the important federal question of how much latitude is to be afforded expert administrators in construing ambiguous terms, particularly when their construction preempts traditional state powers.

D. Preemption of the legislative subpoenas is also inconsistent with the plain statement rule in *Gregory v. Ashcroft*.

1. The issuance of legislative subpoenas is clearly an exercise of state sovereignty of the most fundamental sort.

Finally, the Comptroller has given congressional *ambiguity* a construction which divests the states of one of their core powers. As the decision of their legislatures to issue subpoenas is among those decisions fundamental to the sovereign states, only clear and unmistakable language in the statute itself can support preemption. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court addressed the

question of whether the federal Age Discrimination in Employment Act preempted a Missouri constitutional provision that "[a]ll judges other than municipal judges shall retire at the age of seventy years." It held that before a finding of preemption could be made, Congress had to make its intention to preempt "unmistakably clear in the language of the statute." *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

This requirement turned on the Court's conviction that the power to establish the qualifications of those who would govern was among the state decisions that "go to the heart of representative government." *Id.* at 461. Addressing the state constitutional provision before it, the Court explained:

> [I]t is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who would exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States and to their peace and tranquillity, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."

Id. at 460 (quoting *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900)).

Gregory, however, did not elaborate on how the lower courts are to determine whether a particular state decision is among those of the most fundamental sort for a sovereign entity, and

several Circuits have refused to apply the rule on the grounds that the preempted state decision did not lie at "the heart of representative government." *See First Gibraltar Bank, FSB, v. Morales*, 19 F.3d 1032, 1040 (5th Cir.) (holding state property laws were not state decisions of the most fundamental sort), *cert. denied*, 115 S.Ct. 204 (1994), *vacated on other grounds*, 42 F.3d 895 (5th Cir. 1995); *Reich v. New York*, 3 F.3d 581, 589-90 (2d Cir. 1993) (holding that federal requirement that states pay overtime to police officers did not "strike at the heart of representative government" (internal quotations omitted)), *cert. denied*, 114 S.Ct. 1187 (1994); *Gately v. Massachusetts*, 2 F.3d 1221, 1230 (1st Cir. 1993) (holding that *Gregory's* "plain statement rule" did not apply to state mandatory retirement laws pertaining to police officers), *cert. denied*, 114 S.Ct. 1832 (1994).

The majority's opinion in *Gregory* includes an impassioned disquisition on the benefits bestowed and liberties secured by our federalist structure of dual sovereignty. *Gregory*, 501 U.S. at 456-65. So it is doubtful this Court intended the plain statement rule to be limited to the particular facts of that case. Yet, if the work of a state legislative committee, and its decision to investigate the availability of credit in rural areas, is not an exercise of state sovereignty of the most fundamental sort, it is difficult to see how *any* state decision, other than the one specifically at issue in *Gregory*, would be fundamental enough to require "unmistakably clear" preemptive language in the federal statute. The Legislative

Committee's petition therefore presents this Court with an opportunity to amplify its holding in *Gregory*. The compelling issue of how and when the courts are to apply the plain statement rule in *Gregory* militates for granting the writ.

2. Interpretive rulemaking that preempts a core state power is inconsistent with *Gregory v. Ashcroft*.

Gregory did not involve preemptive agency rulemaking, but rather, the federal statute itself. It therefore left unanswered the question of whether an ambiguous federal statute can be construed by an agency administrator to preemptively deprive the states of one of their core powers. Because the case clearly stands for the principle that congressional silence or ambiguity will not support preemption of state decisions that go to the heart of representative government, it should necessarily follow that an agency cannot supply the clarity that is lacking in the statute itself. To hold otherwise would eviscerate *Gregory*. If agencies *can* preempt fundamental state decisions, the critical question then becomes whether such rulemaking is subject to the "permissible construction" standard of review in *Chevron* or whether greater scrutiny by the Courts is warranted.

It is of compelling importance to our federalist system that this Court address the application of the plain statement rule in the context of agency rulemaking. *Gregory* is, first and foremost, a necessary corollary to the largely deferential posture toward congressional preemption of state law articulated by this Court in

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (5-4 decision). Under the reasoning of *Garcia*, the "built-in restraints" of state participation in the national political process "ensure that laws that unduly burden the States will not be promulgated." *Id.* at 556.

But of course, as *Gregory* teaches, this rationale will be valid only if the preemptive effect of proposed legislation is clear and unambiguous. If an *ambiguous* or *silent* federal statute is later interpreted by an agency administrator to override state sovereignty, and if the Courts see themselves as constrained to give "controlling weight" to such agency action, the states will lose the slender procedural guarantee identified in *Garcia*. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 6-25, at 480 (2nd Ed. 1988) ("to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests") (emphasis in original); *The Supreme Court, 1987 Term--Leading Cases*, 102 HARV. L. REV. 143, 296 (1988) ("A rule that distills displacement of state law from congressional *silence* divests states of even *Garcia's* slender procedural guarantee") (emphasis in original); *see also Welch v. State Dep't. of Highways & Public Transp.*, 780 F.2d 1268, 1276 (5th Cir. 1986) (Higginbotham, J., specially concurring) (if a statute containing ambiguity regarding its preemptive effect is subsequently construed by a court to override

state sovereignty, the states will "have been effectively sandbagged"), *aff'd*, 483 U.S. 468 (1987).

In *California State Board of Optometry v. FTC*, 910 F.2d 976, 981-982 (D.C. Cir. 1990), the Court of Appeals reviewed and expressly rejected rulemaking by the FTC preempting California's laws regulating optometrists, holding that an ambiguous statute could not be construed by an agency to preempt state sovereignty. The Court wrote:

> Were we to defer to [the agency] construction and uphold [the rule] in the face of congressional silence, we would short-circuit the protections offered States by the political process. . . . The clear statement doctrine leaves no room for inferences. An agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it.

Id. at 981-982 .

At issue here is whether administrative agencies may engage in preemption by stealth--that is, giving a state-displacing construction to congressional *ambiguity*, and in doing so, evading the very procedure for lawmaking *Gregory* and *Garcia* relied on to ensure the states are not unduly burdened by federal law. Forcing the states to guess at whether proposed national legislation might lend itself to a "permissible construction" that divests them of one of their core powers, clearly threatens the proper balance of state and federal power. The Comptroller, through informal rulemaking and private opinion letters, has attempted to preempt state

legislative subpoenas; yet the states and those who would represent their interests in the national government were effectively denied any input prior to the adoption of this ill-advised interpretation.

CONCLUSION

The State Representatives' petition for writ of certiorari should be granted.

Respectfully submitted,

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